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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PATRICK LOFTUS, Individually and on Behalf of all others similarly situated, Plaintiff, vs. PRIMERO MINING CORP., JOSEPH F. CONWAY, ERNEST MAST, DAVID BLAIKLOCK, AND WENDY KAUFMAN, Defendants	Case No. 2:16-cv-01034 BRO(RAOx) **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

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Plaintiffs[1] respectfully submit this memorandum in opposition to Defendants' motion to dismiss ("MTD") (ECF No. 74).

INTRODUCTION

Primero is a Canadian mining company whose principal asset is the San Dimas mine in Mexico, ¶¶3, 253, which is owned and operated by Primero's wholly-owned Mexican subsidiary, PEM, ¶¶7, 73.[2] Upon acquiring San Dimas in August 2010, Primero assumed contracts that its predecessor, Goldcorp, entered into regarding the sale of San Dimas' silver to third party Silver Wheaton Corp. ("SW"). ¶¶3, 73-74. Like Goldcorp, Primero was taxed by the Mexican government at the Spot Price (*i.e.*, the prevailing market price) for the silver it extracted from San Dimas and sold to SW. ¶¶3-5, 71, 74. Due to an agreement with SW, Primero, like Goldcorp, only received about $4/oz. ("SW Price") (an amount well below the Spot Price) for the vast majority of that silver. ¶¶3-5, 69-70, 74. As the Spot Price of silver rose even further, so too did Primero's tax obligations. ¶¶3, 5, 77. To reduce its tax liability and increase its profitability and cash flow, Primero devised a scheme to evade taxes. ¶¶6-7, 78-112.

By way of background, "transfer pricing" is the setting of the price for goods and services sold between related entities. ¶35. Mexico's transfer pricing rules prevent multinationals like Primero from transferring goods to foreign related parties to avoid taxes. ¶¶8, 34-39. That is, corporations are required to report income from transactions with related parties based on the prices that two independent parties would have negotiated at arm's length—a/k/a/ the "arm's length principle" ("ALP"). ¶¶8, 36-37. Despite these rules, Primero amended a contract between two of its related party subsidiaries so that the transfer price (*i.e.*, the sale price) of San Dimas silver was the SW Price instead of the significantly higher Spot Price. ¶¶7, 81.[3] As no independent party would have agreed to sell silver—a fungible commodity—so far below market rates, the transfer price violated Mexican transfer pricing rules. ¶¶8-9, 86, 89.

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[1] All "¶" references are to Consolidated Amended Class Action Complaint ("AC"). ECF No. 69. All "Ex." references are to the AC's exhibits. Capitalized terms, unless otherwise defined, shall have the same meaning as those used in the AC. All emphases are added and all internal citations and quotations are omitted unless otherwise noted.

[2] Silver sales, revenues, incomes, and taxes are referred to herein as belonging to Primero or PEM interchangeably. *See* ¶74 n.7.

[3] A depiction of the contractual arrangements can be found at ¶87 and Ex. C.

Notwithstanding this fatal flaw, Primero sought an Advance Pricing Agreement ("APA") ruling from Mexico's tax authority, the SAT, so that Primero could pay taxes based on the lower SW Price. ¶¶10, 12, 102. Recognizing that the amended contract was a transparent attempt to flout Mexican tax law, Primero hired lawyer Christian Natera Nino de Rivera, whose brother Luis was the head of the SAT's Transfer Pricing Audit Administration and was the official in charge of reviewing and approving Primero's APA. ¶¶10, 94. Despite analysts' overwhelming skepticism, ¶¶11, 80, 90, 100, Primero announced on October 5, 2012 that it successfully obtained a positive ruling on its APA ("Ruling") for the years 2010 through 2014, shocking the market and causing Primero's stock to rise 36% that day, ¶¶11-12, 102. One analyst was so stunned he described it as a "miracle of life." ¶104. But the Ruling was no miracle. As *Reforma*, a widely read Mexican newspaper would report years later, the Ruling was obtained illegally due to the behind the scenes chicanery of the Natera brothers. ¶¶13, 230-33, 235-36. Primero's scheme paid off, allowing it to record substantially higher income and cash flows, thereby inflating Primero's stock price. ¶¶50-63.

Plaintiffs assert claims under Sections 10(b) and 20(a) of the Exchange Act and SEC Rule 10b-5 relating to Defendants' participation in the tax evasion scheme, the impact of the scheme on Primero's financial statements and operations, Defendants' numerous false and misleading statements and omissions relating thereto, and Defendants' concealment of the SAT's audits and threats regarding Primero's tax payments once the scheme was uncovered. ¶¶1-2. For the reasons below, Plaintiffs respectfully request Defendants' MTD be denied.

STATEMENT OF FACTS

History of the San Dimas Mine. In 2004, Goldcorp entered into a silver streaming agreement with SW to sell it silver from San Dimas. ¶¶65-66. SW and Goldcorp recognized that someone had to pay taxes on the profits made on Mexico's silver and agreed Goldcorp would do so; thus instead of a simple purchase agreement between Goldcorp and SW, the streaming agreement was structured as two separate silver purchase agreements: (1) Goldcorp's "Internal SPA" which governed the internal transfer price of silver between Goldcorp's Mexican and Barbadian subsidiaries which was required to comply with Mexican transfer pricing rules; and (2) Goldcorp's "External SPA," which governed the price at which Goldcorp's Barbadian subsidiary thereafter sold the silver to SW but was not subject to Mexico's transfer pricing rules because the silver transfers occurred outside of Mexico. ¶68.

The Internal SPA was between DMSL, Goldcorp's Mexican subsidiary which owned San Dimas, and Goldcorp's Barbadian subsidiary, Goldcorp Barbados ("GB"), and provided that DMSL would sell San Dimas' silver to GB at the Spot Price. ¶71. The External SPA was between GB and SW's Caymanian subsidiary, SW Caymans, and provided that GB would in turn sell that silver to SW Caymans at the lesser of $3.90/oz. and the Spot Price, which was approximately $6.68 in 2004. ¶69. Pursuant to the payment structure in the Internal SPA and the applicable transfer pricing rules, Goldcorp paid income taxes in Mexico on silver sales at the Spot Price even though it ultimately received only about $4/oz. for the silver from SW Caymans. ¶71. To offset Goldcorp's tax burden, SW Caymans initially paid GB $46 million (CAN) and 540 million shares of SW. ¶69. The purpose of this arrangement was so that SW, a Canadian company, could attempt to avoid paying taxes in both Mexico and Canada thereby rendering it highly profitable. ¶¶4, 72. Goldcorp was willing to bear the tax burden for SW because Goldcorp had a large stake in SW's success—namely, 540 million SW shares which hedged against rising silver prices and related taxes. ¶69.

Primero Acquires San Dimas. On August 6, 2010, Goldcorp sold San Dimas to Primero. ¶¶5, 73. As part of the sale, Primero acquired GB, which was renamed ST Barbados, ¶73, and Primero assumed the External SPA and Internal SPA, with amendments, ¶74. By then, however, GB had sold its 540 million SW shares and was no longer hedged. ¶75. Under the Internal SPA, nearly all of the silver produced at

San Dimas was to be sold by PEM to ST Barbados at Spot Prices. ¶¶4, 74, 76, 87, 155; *see also* Ex. C. Under the External SPA, ST Barbados was then to sell that silver to SW Caymans at the lesser of the SW Price (about $4/oz.) and Spot Prices, which were then about $17-18 per ounce. ¶74. After its yearly quota was met, Primero could and did sell San Dimas silver at Spot Prices to other parties. ¶74. As required by Mexico's transfer pricing rules, Primero calculated its income taxes based on silver sales at Spot Prices despite receiving the much lower $4/oz. SW Price for most of the silver it sold. ¶¶4, 77. Unlike Goldcorp, Primero received no upfront payment from SW to offset the tax burden attending these contracts. ¶75. When the price of silver nearly doubled to $35 per ounce in March 2011, so too did Primero's tax obligations. ¶77.

The Tax Evasion Scheme. Facing an effective tax rate of 255%, MTD at 2, Primero devised a scheme to survive. ¶78. It decided to file an APA to request that Mexico essentially agree to a tax concession that would allow Primero to pay taxes on silver sales at the SW Price instead of the Spot Price.[4] ¶95. The problem for Primero was that it had no legal basis to pay lower taxes, as confirmed by the fact that Goldcorp paid taxes on its silver sales under the Internal SPA at the Spot Price when it owned San Dimas. ¶¶3-5, 9, 71. Primero's "solution" was to amend the Internal SPA in October 2011 so that PEM would sell the San Dimas silver to its related party ST Barbados at the SW Price instead of the Spot Price. ¶¶7, 78. Primero's amendment, however, was contrary to the ALP. ¶91.

Mexico is a member of the OECD, which created international transfer pricing guidelines to prevent multinationals from using bogus intercompany transfer pricing to shift profits to low tax jurisdictions. ¶¶35-36. The ALP is the guiding standard of Mexico's transfer pricing rules. ¶¶36-37. Corporate taxpayers "dealing with foreign

[4] In Mexico, the SAT rules on an APA in response to a specific request by a taxpayer. ¶45. Once granted, an APA ruling binds Mexico and the taxpayer to the methodology used to determine the prices or amounts in transactions between related parties. ¶45. It is valid for a term of five years, spanning the year preceding its acquisition through the following four fiscal years. ¶46. If obtained by fraud or misrepresentation, an APA ruling can be retroactively annulled by Mexico's Federal Court of Tax and Administrative Justice ("Tax Court") through a process initiated by the SAT called a *juicio de lesividad* ("*juicio*"). ¶47.

related parties" must comply with the ALP, which requires them to "determine their gross income and allowable deductions by using the prices and consideration that they would have used ***with independent parties*** in comparable transactions," ¶37, ***at the time the transactions were entered into***, ¶88. As silver is a fungible commodity traded on the open market with readily ascertainable Spot Prices, it is easy to determine its value at a particular time. ¶89. When the Internal SPA was amended in October 2011, the Spot Price of silver was approximately $38 per ounce. ¶89. No independent party in PEM's shoes would have agreed to sell silver to a third party at prices that were roughly 10% of the Spot Price. ¶¶9, 86, 89.

When asked about Primero's tax reduction initiative before the APA was submitted, CEO Conway replied that the chance of getting a positive Ruling was "50-50." ¶80. Outsiders were dubious. One analyst asked what incentive Mexico could possibly have to approve the APA when the country was "obviously going to be the net loser" if Primero paid taxes at the significantly lower SW Price. ¶¶11, 80. Another described the chances of obtaining the Ruling as "highly unlikely." ¶¶11, 100. Indeed, whether the agreements were viewed in isolation or as a whole, the APA's chances of approval were bleak because: (1) no independent party would have agreed to sell silver so far below the Spot Price, ¶¶9, 86; and (2) SW, the ultimate profiteer from San Dimas silver, did not pay taxes to Mexico on its profits,[5] ¶¶72, 90.

Despite the long odds, Primero announced that it successfully obtained the Ruling on October 5, 2012, ¶101, sending its stock up 36% in one day, ¶102. As would later be revealed, Defendants ensured that the APA was illegally approved by hiring Christian Natera, whose brother Luis was the head of the Transfer Pricing Audit Administration of the SAT and who had his subordinate sign the Ruling to conceal his role. ¶¶10, 13, 92, 94, 230-36.

[5] In fact, a federal securities class action lawsuit is currently pending in this District against SW in relation to the Canadian tax authority's July 2015 determination that SW violated Canada's transfer pricing rules with respect to the metal streaming agreements entered into by SW Caymans and should have its taxes reassessed accordingly. *See* ¶72. The decision sustaining the plaintiffs' claims against SW is attached to the AC as Ex. E.

The Truth Is Revealed. Two months after Primero received the Ruling, a new administration came to power in Mexico. ¶¶14, 113. High level officials were replaced, and the SAT began to crack down on tax evasion schemes by multinationals. ¶¶113-14. As of August 2013, Luis Natera was no longer at the SAT. ¶115. In November 2013, he was suspended from public service for six and a half years by the Ministry of Public Administration ("SFP"), due to his failure to recuse himself from Primero's APA application. ¶¶115, 230, 233. As Primero would eventually reveal, the SAT had been challenging Primero's tax situation ***no later than May 2015***. ¶¶14, 117. Eventually, and unbeknownst to investors, the SAT filed a *juicio* in August 2015 seeking to nullify the Ruling. ¶¶14, 117, 119, 232, 237, 245. As legal proceedings in Mexico are not public, and no contemporaneous news reports disclosed the SAT's nullification claim, investors were kept in the dark about the *juicio*'s filing until February 3, 2016, when Primero announced PEM's receipt of ***service*** of the *juicio*. ¶¶15, 120, 227, 239. In response, Primero's stock plummeted 28% and investors suffered massive losses. ¶¶15, 121, 228, 248.

LEGAL ARGUMENT

"[T]he court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000).

I. DEFENDANTS' EXTRINSIC EVIDENCE IS INADMISSIBLE

In ruling on a motion to dismiss under Rule 12(b)(6), the Court is precluded from considering extrinsic evidence without first converting the motion to one for summary judgment and granting Plaintiffs a reasonable opportunity to conduct appropriate discovery. *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010); Fed. R. Civ. P. 12(d), 56(d). Plaintiffs object to the Court's consideration of Defendants' extrinsic evidence (exhibits B-U & W-X to the MTD (ECF Nos. 75-2–21, 75-23–24) ("MTD Ex.")), particularly since Defendants asserted no basis for the Court to consider them and therefore waive any related arguments. *Somers v. Digital Realty*

Trust, Inc., 119 F. Supp. 3d 1088, 1106 (N.D. Cal. 2015).[6]

Plaintiffs also object to consideration of MTD Ex. A (ECF No. 75-1)—a web page not cited in the AC—and Defendants' assertion that Primero's entire ***current*** website is incorporated by reference. A court "may, but is not required to incorporate [a] document[] by reference," *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012), if the document is (1) "central to [the] [AC]" such that "the [AC] 'necessarily relies' on" them, *Ecological Rights Found. v. Pac. Gas, Elec. Co.*, 713 F.3d 502, 511 (9th Cir. 2013); ***and*** (2) there are no "disputed issues as to the document's relevance." *Coto*, 593 F.3d at 1038. MTD Ex. A is not "central to" the AC, *Ecological Rights*, 713 F.3d at 511, especially because there is no allegation that Plaintiff relied on or was misled by this webpage, let alone Primero's entire current website. *See Missud v. Oakland Coliseum Joint Venture*, 2013 U.S. Dist. LEXIS 29915, at *32-33 (N.D. Cal. Mar. 5, 2013) (declining to consider website quoted in complaint); *cf. Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (incorporating photo of *single* webpage to determine context of defamatory caption).

Plaintiffs further object to all of the above exhibits on hearsay grounds. On a 12(b)(6) motion, the Court must draw all reasonable inferences in Plaintiffs' favor; it would be inherently unreasonable for the Court to draw any inferences against Plaintiffs based on inadmissible evidence. *See In re Ecotality, Inc. Sec. Litig.*, 2014 U.S. Dist. LEXIS 130499, at *12 n.2 (N.D. Cal. Sept. 16, 2014) (assuming truth of hearsay "would mean assuming the truth of all of Defendants' allegedly false or misleading statements [] [which] cannot be the intended result of [the incorporation by reference doctrine], or it would be impossible ever to successfully plead a fraud claim").[7]

II. DEFENDANTS CONCEDE PLAINTIFFS' SCHEME CLAIM

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[6] During the meet and confer, which occurred one day before the MTD was filed (MTD at 2), Defendants did not assert that they would submit any exhibits.

[7] *See also Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (judicial notice inappropriate to determine "whether the contents of those articles were in fact true").

Plaintiffs asserted both fraudulent statement and fraudulent scheme claims, ¶¶2, 6, 10, 340, 358, yet Defendants failed to address Plaintiffs' scheme claim. *See* Defendants' Notice of Motion (ECF No. 74) at 2 (moving to dismiss only "misrepresentations or omissions" claims); MTD at 2 (same); MTD at i-ii (no section arguing against scheme claim). A scheme claim is a separate basis of liability which arises from violations of: (1) Rule 10b-5(a), 17 C.F.R. § 240.10b-5(a), which prohibits persons from employing "any device, scheme, or artifice to defraud" or (2) Rule 10b-5(c), 17 C.F.R. § 240.10b-5(c), which prohibits persons from "engaging 'in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.'" *In re Galena Biopharma, Inc. Secs. Litig.*, 117 F. Supp. 3d 1145, 1191-92 (D. Or. 2015). By failing to address Plaintiffs' scheme claim, ¶¶1-15, 78-121, 230-50, 265-84, 291-97, 306-12, 358, Defendants have waived any argument for its dismissal. *See Nathanson v. Polycom, Inc.*, 2015 U.S. Dist. LEXIS 50450, at *2-3 (N.D. Cal. Apr. 15, 2015) ("*Nathanson I*").[8]

III. PLAINTIFFS STATE A CLAIM FOR DEFENDANTS' MATERIALLY FALSE AND MISLEADING STATEMENTS AND OMISSIONS

Claims brought under Section 10(b) of the Exchange Act and Rule 10b-5(b), 17 C.F.R. § 240.10b-5, promulgated thereunder, must satisfy the requirements of Fed. R. Civ. P. 9(b) and the PSLRA. *Reese v. Malone*, 747 F.3d 557, 568 (9th Cir. 2014). The PSLRA's pleading requirements "[do] not impose an insurmountable standard." *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 708 (9th Cir. 2012). A plaintiff need only plead facts, not produce admissible evidence. *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1272 (N.D. Cal. 2000).

[8] Although "the conduct underlying claims for scheme liability must be alleged with particularity under Rule 9(b)[,]" it is "not subject to the PSLRA pleading requirements[.]" *Galena*, 117 F. Supp. 3d at 1193. "Because the exact mechanism of the scheme is likely to be unknown to the plaintiffs, allegations of the nature, purpose, and effect of the fraudulent conduct and the roles of the defendants are sufficient for alleging participation." *Id.* Indeed, the Ninth Circuit has established that the Rule 9(b) standard is relaxed in "corporate fraud cases where the evidence of fraud is within a defendant's exclusive possession," *United States v. Smithkline Beecham Clinical Labs.*, 245 F.3d 1048, 1052 (9th Cir. 2001), and affords Plaintiffs "opportunity for discovery." *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (affirming dismissal and noting plaintiff's opportunity for discovery of insider trading claims).

Although not discussed during the meet and confer, Defendants assert the AC is a puzzle pleading. This argument fails because Plaintiffs identified outright that bold and italicized portions of the statements in ¶¶123-224 are those alleged to be false and/or misleading. ¶122; *see In re CornerStone Propane Partners, L.P. Sec. Litig.*, 355 F. Supp. 2d 1069, 1081 (N.D. Cal. 2005); *see also In re Intuitive Surgical Sec. Litig.*, 65 F. Supp. 3d 821, 831 (N.D. Cal. 2014).

A. Defendants Misled Investors About the APA Ruling

Statements are actionable if they are false ***or*** misleading. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37 (2011) (citing 17 C.F.R. § 520.10b-5(b)). By speaking about how Primero successfully obtained the Ruling and appropriately recorded revenue and taxes at the SW Price rather than the Spot Price,[9] Defendants put these topics "in play," giving rise to Defendants' "duty to speak ***fully*** and ***truthfully***" about them. *In re Apollo Group, Inc. Sec. Litig.*, 395 F. Supp. 2d 906, 920 (D. Ariz. 2005). Yet, Defendants omitted to disclose that the Ruling was obtained improperly, rendering it vulnerable to retroactive nullification and highly unlikely to be renewed.

Defendants continuously touted the Ruling's positive effect on Primero's tax position. After the Ruling was received, Primero/Conway[10] described it as having "cleared" Primero of "a significant tax burden," ¶125, and "overhang," ¶146. Defendants also stated that Primero "claimed," and eventually "received," a $22 million refund for taxes previously "overpaid" at the Spot Price between the date it purchased San Dimas and the date of the APA filing. ¶¶129, 136, 144. They also claimed that the Ruling "confirm[ed]" that Primero appropriately recorded its revenue and taxes at the SW Price,[11] and improved and increased cash flow, ¶¶136, 142, 155. Additionally, Defendants represented that the only obstacles facing its ability to continue to pay taxes at the SW Price were changes in the price paid under the External SPA and the tax laws relative to the Ruling[12] or the application thereof.[13]

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[9] ¶¶123, 127, 134, 136, 138, 144, 148, 153, 155, 163, 170, 175, 178, 181, 186, 190, 192, 196, 198, 203, 205, 206, 208, 214, 220.

[10] Primero is vicariously liable for the statements of its officers. *Curry v. Hansen Med., Inc.*, 2012 U.S. Dist. LEXIS 112449, at *36 (N.D. Cal. Aug. 10, 2012).

[11] ¶¶123; *see also* 127, 134, 136, 138, 144, 148, 153, 155, 163, 170, 175, 178, 181, 186, 190, 192, 196, 198, 203, 205, 206, 208, 214, 220.

Given the importance of the Ruling to Primero's bottom line, "[a]ny facts bearing" on its continued viability are plainly material. *Yanek v. Staar Surgical Co.*, 388 F. Supp. 2d 1110, 1129 (C.D. Cal. 2005). Separately and cumulatively, when viewed in context and with common sense, Defendants' representations created the false and misleading impression that the Ruling had been procured legitimately, complied with Mexican transfer pricing rules, and was therefore virtually unassailable for its initial term and likely to be renewed.

The true facts, however, were that Primero obtained the Ruling through improper means by hiring Christian Natera to have his brother Luis, head of the SAT's Transfer Pricing Administration, surreptitiously secure its approval because the requested tax treatment of the amended transfer price did not comply with Mexican transfer pricing rules. As a result, Primero was not entitled to a tax refund because it had not overpaid its taxes before submitting the APA application, the Ruling was vulnerable to retroactive nullification at any time, and the Ruling was highly ***unlikely*** to be renewed.[14] "[T]here is a 'substantial likelihood' that a reasonable investor would consider" this information "important in his or her decision making." *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 934 (9th Cir. 2003). Consequently, the failure to disclose these facts "affirmatively created an impression of a state of affairs that differed in a material way from the one that actually existed." *Reese*, 747 F.3d at 570; *see Schueneman v. Arena Pharms., Inc.*, 2016 U.S. App. LEXIS 19318, at *16 (9th Cir. Oct. 26, 2016) ("[O]nce defendants choose to tout positive information to the market, they are bound to do so in a manner that wouldn't mislead investors, including disclosing adverse information that cuts against the positive information."). Defendants disclosed nothing about the Natera brothers' involvement, let alone that the Ruling was subject to being voided *ab initio* due to the Nateras' misconduct. Indeed, they only ambiguously warned that the laws or the "application" of the laws with respect to the Ruling might change. *See, e.g.*, ¶¶123, 169. Neither changed. It was the SAT's realization that the SW Price did not comply with ***existing*** Mexican transfer pricing rules and that the Ruling was obtained improperly, which led to the filing of the *juicio*. ¶¶14, 232, 295.

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[12] ¶¶167, 169, 177, 180, 185, 191, 196, 197, 203, 206, 207, 214, 220.
[13] ¶¶123, 127, 134, 136, 138, 144, 148, 153, 155, 159, 163, 170, 175, 178, 181, 186, 190, 192, 198, 205.
[14] ¶¶124, 126, 128, 130, 133, 135, 137, 139, 141, 143, 145, 147, 149, 152, 154, 156, 158, 160, 162, 164, 166, 168, 171, 174, 176, 179, 182, 184, 187, 189, 193, 195, 199, 202, 204, 209, 211, 215, 217, 221, 223.

Defendants attempt to discount these well-pled allegations by arguing that the *Reforma* articles which detail the Natera brothers' involvement in Primero's improper procurement of the Ruling should not be given any weight because their reliability cannot be evaluated. Defendants only make this challenge because *Reforma* is a Mexican publication. *See* MTD at 20 (citing *McKesson*, 126 F. Supp. 2d at 1272, which notes "[r]eliance on an article in the *Wall Street Journal* is not reliance on an insubstantial or meaningless investigation"). *Reforma*, which published two of the articles that the AC cites, is a widely read and well-respected Mexican newspaper, ¶¶230-32, 235-36.[15] Additionally, the Mexican Supreme Court's decision to assert jurisdiction with respect to Luis Natera's suspension, ¶¶233-34, corroborates *Reforma*'s contention that Luis was disqualified from serving in the public sector for six and a half years for failing to recuse himself from deciding on an October 17, 2011 transfer pricing application, ¶233—the exact date on which Primero states it submitted its APA application, ¶95—and that Luis did not sign the Ruling, ¶234.[16] *See McKesson*, 126 F. Supp. 2d at 1272 (If "a newspaper article corroborates plaintiff's own investigation and provides detailed factual allegations, it can—at least in combination with plaintiff's investigative efforts—be a reasonable source of information and belief allegations.").[17]

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[15] *See also* Jose de Cordoba & Joel Millman, *Shootout Near School Shocks Mexico*, Wall St. J., Aug. 23, 2010, *available at* http://www.wsj.com/articles/SB100014240527 48704504204575445970398254874 (describing *Reforma* as "a respected Mexican newspaper"); *Reforma*, Multimedia, Inc., http://www.multimediausa.com/assets/ newspapers/reforma/ (last visited October 30, 2016) (describing *Reforma* as the "2nd leading general interest newspaper in Mexico").

[16] Primero's own statements also corroborate many of the facts in the May 2, 2016 *Reforma* article, ¶¶230-32, such as the dates pertaining to the APA, ¶101, and the *juicio*'s filing, ¶119.

The erroneous nature of the Ruling itself confirms the *Reforma* reports, as does the commentary by analysts who were highly skeptical that the APA would be approved. APAs do not supersede the ALP, which requires that corporations report their income from transactions with foreign related parties based on prices that the parties would have agreed at the time they were entered into if the transactions were between two independent parties. ¶¶8, 36-37, 43, 45, 88. Just as no independent party would accept $4 for silver it could easily sell for $38, ¶89, Mexico would never agree to receive a fraction of the tax revenues it previously received and was entitled to from the sale of its own natural resources due to contracts arranged by two foreign companies (Primero and SW). ¶¶90, 244. No other entity that profits from the sale of San Dimas silver (SW Caymans and, ultimately, SW in Canada) would make up for the resulting tax shortfall, as Mexico has no "nexus" to them. ¶¶72, 90. To quote an analyst skeptical of Primero's chances of getting the APA approved, why should "Silver Wheaton contractual stuff . . . supersede Mexican tax law?" ¶90. It does not. Mexico's transfer pricing rules provide no support for the principle that foreign companies get tax breaks for bad business deals. If that were permitted, surely Primero's predecessor Goldcorp would have obtained a Ruling as well. ¶¶9, 91.

Defendants argue that the amended transfer price complies with the ALP because it is the same price at which SW Caymans buys San Dimas silver from ST Barbados under the External SPA. ¶¶72, 90. Defendants' circular reasoning is of no avail. No one denies that many independent parties would eagerly buy silver from ST Barbados at significantly below market prices. The relevant question is whether any independent party would, like ST Barbados, sell its silver for a tiny fraction of what it could get on the open market. Obviously not. In fact, PEM sells San Dimas silver to third parties ***at the Spot Price after*** meeting its yearly sales quota to SW Caymans under the External SPA. ¶¶74, 123, 212.

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[17] Defendants' citation to *In re Neustar Sec. Litig.*, 83 F. Supp. 3d 671 (E.D. Va. 2015), is easily distinguishable. There, the court found that there was no evidence that the plaintiff corroborated the allegations in *Capitol Forum*, a subscription news service with only about 500 subscribers, with its own investigation. *Id.* at 685-86 & n.8

Defendants further argue that "[t]he Court should presume the validity of the [] Ruling absent a ruling from a Mexican court nullifying [it]" under the act of state doctrine, which "merely requires that, in the process of deciding" cases "that may embarrass foreign governments," "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409-10 (1990) (finding the doctrine inapplicable where the validity of no foreign sovereign act was at issue). Defendants' reasoning is flawed. By asking the Court to presume the Ruling valid, they are necessarily asking the Court to presume invalid the actions of the SAT in seeking to nullify ***its own ruling***. Furthermore, there is no risk that finding Defendants engaged in a fraudulent scheme or made false and misleading statements would embarrass the Mexican government; it is the Mexican authorities themselves who have decided that actions taken with respect to the Ruling involved fraud or misrepresentation: the SAT filed the *juicio* seeking to nullify ***its own ruling***, ¶119, and the SFP decided to suspend Luis Natera from serving in the public sector due to his actions with respect to the Ruling, ¶¶230-34.[18]

The court's decision in *Silver Wheaton*, which involves the same silver as this case (Ex. E), is directly on point. There, the Canada Revenue Authority ("CRA") reassessed SW's tax obligations because it believed that SW violated Canada's transfer pricing rules by attributing its profits from streaming agreements (such as the one at issue here) to its subsidiary, SW Caymans, and paying no taxes to Canada. *In re Silver*

[18] Defendants' citation to *Tiangang Sun v. China Petroleum & Chem. Corp.*, 2014 U.S. Dist. LEXIS 107167, at *28-29, 38 (C.D. Cal. Apr. 15, 2014), which involves the Alien Tort Statute, does not compel a different result. In that case, the court declined to rule on whether calls made to the plaintiff "were designed to convince him to return to Hong Kong so that he could be arbitrarily arrested by PRC law enforcement" where there was no allegation that PRC authorities found that PRC law enforcement were attempting to arbitrarily arrest the plaintiff. *Id.*

Wheaton Corp. Sec. Litig., 2016 U.S. Dist. LEXIS 74162, at *8, 14 (C.D. Cal. June 6, 2016). Although Canadian tax courts have the final say on whether the reassessment stands, the court stated that the CRA's decision to reassess SW's tax liability "is, at a minimum, relevant" to whether the defendants misrepresented SW's potential tax liability, as the CRA is "charged with interpreting and enforcing Canada's income tax laws." *Id.* at *27 n.6. As the SAT is the agency charged with interpreting and enforcing Mexico's tax laws, ¶305, its determination that the Ruling should be annulled is certainly relevant as to whether Defendants misrepresented the Ruling's continued viability, tax liabilities (*see* §III.B, *infra*), and potential for renewal, regardless of the Tax Court's ultimate decision.

B. Defendants' Financial Statements Did Not Comply With IFRS

Defendants falsely claimed that Primero's annual and interim financial statements ("FS") were "prepared in accordance" with IFRS.[19] These statements were false when made because (1) Primero's net income was materially overstated and its income tax expense was materially understated because it failed to record and recognize the appropriate tax liability, or (2) alternatively, Primero failed to disclose the appropriate contingent liability.[20] FS filed with the SEC that purport to comply with applicable accounting standards but fail to do so contain false and/or misleading information. *See, e.g.*, *Silver Wheaton*, 2016 U.S. Dist. LEXIS 74162, at *29 (FS not prepared in accordance with generally accepted accounting principles ("GAAP") or IFRS were false and misleading); *In re Daou Sys., Inc.*, 411 F.3d 1006, 1020 (9th Cir. 2005) (finding FS filed with the SEC that did not comply with GAAP to be misleading).

1. Primero Was Required To Record and Recognize a Tax Liability Based On The Spot Price

IFRS standards IAS 12 and IAS 37 applied to Primero's tax positions for all of the FS that it filed with the SEC from 2012 to 2016. ¶¶52, 56, 58. IAS 37 requires an entity to recognize an uncertain liability in its FS when it has a present obligation as a result of a past event, it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation, and a reliable estimate can be made of the amount of the obligation. ¶53. Probable means "more likely than not" (*i.e.*, greater than 50%). ¶54. An entity is required to recognize and record a tax liability in its FS, therefore, if it is more likely than not that it will be assessed additional income taxes, penalties, or interest and those amounts can be reliably estimated. ¶55.

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[19] ¶¶131, 140, 150, 157, 161, 165, 172, 183, 188, 194, 200, 210, 216, 222.

[20] ¶¶133, 141, 152, 158, 162, 166, 174, 184, 189, 195, 202, 211, 217, 233.

Primero was required to recognize and record a tax liability if it was more likely than not that the SAT would require Primero to revert to paying income taxes on the Spot Price of silver rather than the SW Price and therefore pay additional income taxes, penalties, or interest for the periods covered by the FS. ¶¶54-55, 298. It was probable that Primero would have to pay these additional amounts and would therefore need to record them as a tax liability for several reasons:

- Recording taxes and revenues at the SW Price rather than the Spot Price did not comply with Mexican transfer pricing rules, *see* §III.A, *supra*; ¶298;
- The Ruling was improperly procured and was therefore subject to retroactive nullification at any time, *see* § III.A, *supra*; ¶¶48, 298;
- Two months after the APA was granted, a new administration came to power in Mexico and officials from the previous administration were being replaced, ¶¶14, 113, 298;
- Soon thereafter, the SAT began to crack down on multinational corporations suspected of avoiding taxes in Mexico by shifting profits to other countries, ¶¶14, 114, 261;
- Luis Natera, who approved the Ruling was replaced at the SAT as of August 2013, ¶¶115, 298, and was disqualified from serving in the public sector as of November 21, 2013 in connection with his role in Primero's Ruling, ¶¶233, 298; and
- As a multinational corporation that had restructured itself for tax purposes and paid Mexico millions less in income tax as a result, Primero was likely to be a prime target of the SAT's scrutiny, especially because Luis's suspension was related to Primero's Ruling, ¶¶114, 116, 262, 298.

Furthermore, Primero could reliably estimate the amounts of the additional income taxes, penalties, or interest because for each financial statement period, it knew the amount of silver it sold at the SW Price (which was between 11–27% lower than the Spot Price at all times),[21] the applicable tax rate,[22] and the penalties that the SAT may assess when transfer pricing is unsupported, ¶41. For example, before the Ruling was granted, Primero was able to estimate the amount of taxes it would have to pay if the APA was rejected and it had to revert to paying taxes based on the Spot Price because it recorded a contingent liability to reflect that amount. ¶98. In 2011 and 2012, the contingent liability was 49% and nearly 100%, respectively, of Primero's gross income for that year. ¶257. While Plaintiffs cannot definitively estimate the amounts Primero should have recorded and recognized as a tax liability, they were clearly material. Accordingly, Primero was required to recognize and record a tax liability in all of its relevant FS. Because it failed to do so, its net income was materially overstated and its income tax was materially understated, and therefore its FS did not comply with IFRS.[23]

Defendants argue that it is significant that there is no allegation that Primero's external auditors disagreed with its accounting for taxes. Considering that the *jucio* is not publicly available and no English-language news media has yet published the SAT's reasons for seeking to nullify the Ruling, ¶239, it is quite possible that Primero's external auditors do not know about the extent of the allegations against Primero. At this stage of the litigation, "there is no way to determine what disclosures were made to the auditors and what considerations led the auditors to certify the financial statements." *In re New Oriental Educ. & Tech. Grp. Sec. Litig.*, 988 F. Supp. 2d 406, 426 (S.D.N.Y. Dec. 23, 2013). Courts have found that defendants made false and misleading statements where they failed to disclose uncertain tax liabilities in violation of applicable accounting principles, even where there was no allegation that external auditors advised against it. *See Silver Wheaton*, 2016 U.S. Dist. LEXIS 74162, at *31-32 (defendants "failed to adequately apprise investors of [SW]'s potential tax

[21] Silver Spot Prices ranged from about $15-35 during the Class Period. *See* ¶¶133, 223.
[22] These figures are set forth for each FS in the following paragraphs: ¶¶133, 141, 152, 158, 162, 166, 174, 184, 189, 195, 202, 211, 217, 223.
[23] ¶¶131-32, 140, 150-51, 157, 161, 165, 172-73, 183, 188, 194, 200-01, 210, 216, 222.

liability" where they downplayed the significance of the CRA's audits and made no effort to provide a reasonable estimate of any potential liability even where SW's outside auditors and accountants knew of the audits and did not require defendants to record a tax liability or disclose a contingent liability); *In re Ebix, Inc. Sec. Litig.*, 898 F. Supp. 2d 1325, 1343 (N.D. Ga. 2012) (defendants made false and misleading statements by failing to record an adequate tax expense where accounting principles required them to record a deferred tax liability for intercompany transactions even where there was no restatement); *In re Scottish Grp. Sec. Litig.*, 524 F. Supp. 2d 370, 390 (S.D.N.Y. 2007) (FS false when made where the company's value was overstated because a planned securitization transaction made it more likely than not that the company would be unable to realize its deferred tax assets in the future and therefore required a reduction of deferred tax assets at the time the plan was announced, even though the auditor issued a "clean" opinion).

2. Alternatively, Primero Was Required To Disclose a Contingent Liability Based On The Spot Price

Assuming *arguendo* that the foregoing criteria for recognizing an uncertain tax liability were not met, Primero was consequently required to disclose a contingent liability because the probability that it would have to pay additional income taxes, penalties, and interest was not "remote." ¶59.

IAS 12, which prescribes the treatment for income tax under IFRS, specifies that tax-related contingent liabilities must be disclosed in accordance with IAS 37. ¶58.[24] IAS 37 provides that a contingent liability must be disclosed when a possible obligation arises from past events and the obligation's existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events that are not

[24] Defendants' argument that the lack of formal guidance concerning uncertain tax positions under IFRS means that Primero was not required to recognize a tax liability is just disputing the facts with improper extrinsic evidence, as the AC explicitly states that IAS 37 is the applicable accounting principle for uncertain tax positions under the IFRS from fiscal years 2011 through 2015." ¶52. *See* §I, *supra*; *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 155 (2d Cir. 2006) ("[A]rguments based on the moving parties' assertions of fact are inapt on a motion to dismiss.").

wholly within the entity's control. ¶57. Primero's tax situation fits this definition because of the fact that the Ruling was vulnerable to retroactive nullification and could result in Primero's obligation to pay additional income taxes, penalties, and interest arose from a past event—the improper procurement of the Ruling and the failure to comply with applicable transfer pricing rules—which could be confirmed only by the occurrence or non-occurrence of events currently out of Primero's control—the SAT's filing of a *juicio* seeking to nullify the Ruling.

As the amended transfer price did not comply with the applicable transfer pricing rules, the Ruling was improperly procured, and a new administration was targeting multinationals for tax fraud, the SAT's reassessment of Primero's tax situation was not remote, but in fact possible. *See* §III.A, *supra*. Indeed, IAS 12 lists "unresolved disputes with the taxation authorities" as an example of a contingent liability that must be disclosed. ¶58. Accordingly, Primero was required to disclose (a) an estimate of the reassessment's effect; (b) an indication of the uncertainties relating to the amount or timing of any outflow; and (c) the possibility of any reimbursement. ¶59. While Plaintiffs cannot perfectly estimate the precise amount of the contingent liability for each financial statement, based on the related contingent liability disclosed before the APA was approved, it was quite substantial. ¶¶98-99, 257; *see also* §III.B, *supra*. Primero failed to disclose this material contingent liability in its FS, and, as a result, its FS were misleading when made.[25] *See Silver Wheaton*, 2016 U.S. Dist. LEXIS 74162, at *27-30 (FS adequately alleged to be false or misleading where SW was required to disclose a contingent liability under IAS 37 as there was more than a "remote" possibility that the CRA would find that SW had violated Canada's transfer pricing rules and would reassess SW's taxes); *City of Monroe Emples. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 678-81 (6th Cir. 2005) (failure to "disclose[] the contingency of any loss or asset impairment related to any of the [ ] tire products due to the lawsuits, regulatory scrutiny, or safety-related reasons," and "the potential risk of such an event"

[25] ¶¶131-32, 140, 150-51, 157, 161, 165, 172-73, 183, 188, 194, 200-01, 210, 216, 222.

was actionable); *cf. SEC v. Fehn*, 97 F.3d 1276, 1291 (9th Cir. 1996) (omission of earlier securities violations that may result in civil liability were material because "[a]lthough CTI's liabilities were not inevitable, but . . . contingent, they represented a potentially large financial loss for CTI, and therefore should have been disclosed").[26]

C. The SAT Challenged Primero's Tax Arrangements No Later Than May 2015

In addition to the reasons set forth in §§III.A-B, *supra*, Defendants' statements about the appropriateness of recording revenue and taxes at the SW Price,[27] the Ruling,[28] and its FS's compliance with IFRS[29] that were made in or after May 2015 were misleading for the additional reason that unbeknownst to investors, the SAT was actively challenging Primero's "tax arrangements" at that time. ¶¶245-46. As Defendants revealed in the NOIA[30] after the Class Period, these challenges involved investigations into PEM's operations and ***tax audits for certain years covered by the Ruling***. ¶117. They even led to the May 2015 suspension of PEM's import/export licenses, ¶117, which Primero later admitted was material as the suspension "compromised PEM's operations and caused substantial damages to Primero," ¶125. Ultimately, the SAT filed the *juicio* in August 2015 seeking to nullify the Ruling, meaning that not only was renewal on the same terms highly unlikely, but the APA was in imminent danger of retroactive nullification. ¶119. As Defendants later admitted, the mere filing of the *juicio* was material, as it "generated significant legal uncertainty and has harmed Primero." ¶120. Yet, Defendants continued to discuss the Ruling and the appropriateness of recording revenues and taxes at the SW Price as if their tax arrangements were not in jeopardy. ¶¶205-08, 214, 220, 224.

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[26] Defendants citation of *Oregon Pub. Emples. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 609 (9th Cir. 2014), which does not address the disclosure of contingent liabilities under IFRS, does not compel a different result. There, the plaintiffs alleged that the defendants made false and misleading statements by counting tuition expected from students whose tuition was funded by Title IV of the Higher Education Act as part of its revenue even though the university was required to return the Title IV funds when students left their school. *Id.* at 609. Because applicable regulations allowed Apollo to charge departing students for any remaining tuition owed, Apollo did not misrepresent its revenue by including Title IV students' tuition and properly disclosed the difficulty of collecting tuition from withdrawn students by explaining that the increase in its bad debt reserves was "partially attributable to uncollectible student tuition." *Id.* By contrast, Defendants here have pointed to no analogous regulation that would allow them to refrain from disclosing a contingent liability to reflect the vulnerability of its ability to pay taxes based on the SW Price.

[27] ¶¶205, 206, 208, 214, 220.

[28] ¶¶205, 206, 208, 214, 220, 224.

[29] ¶¶210, 216, 222.

[30] The NOIA is the Notice of Intent to Submit a Claim to International Arbitration that Primero filed against Mexico under NAFTA in June 2016. ¶87 n.9.

Even when the fact that PEM's licenses had been suspended was disclosed in July 2015, Defendants misleadingly attributed it to a mere address discrepancy rather than part of the SAT's threats to Primero's tax position. ¶¶212, 218. Meanwhile, Defendants represented that the only obstacles facing its ability to continue to pay taxes at the SW Price were changes in the price paid under the External SPA and the tax laws relative to the Ruling or the application thereof. ¶¶205-24. Even when asked explicitly in November 2015 about whether Primero filed an application to renew the APA, ***nearly a year after the original APA's term had expired***, Conway did not disclose the fact that renewal was unlikely or that PEM was being audited and threatened, stating instead: "we are having some discussions with the tax authorities on that front, just on an informal basis . . . but we have opened up a dialog." ¶224.

In context, Defendants "did more than just express confidence" in the Ruling's chances of renewal, "[they] affirmatively represented that" based on the information in their possession, absent a change in the law or the terms of the External SPA, Primero would be able to pay taxes on the SW Price for the life of the mine. *Arena*, 2016 U.S. App. LEXIS 19318, at *22. That Defendants stated there can be "no assurance" that laws applicable to the Ruling will not change or that the "authorities will issue a renewal or similar ruling" does not change the analysis, as these statements "speak about the risks" of Primero's ability to pay taxes based on the SW Price "in the abstract, with no indication that the risks may already have come to fruition." *Flynn v. Sientra, Inc.*, 2016 U.S. Dist. LEXIS 83409, at *30-31 (C.D. Cal. June 9, 2016); *accord. Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 987 (9th Cir. 2008). By raising the issue of renewal and specific impediments to it, Defendants were required to disclose the real threat: that the SAT was threatening Primero's tax arrangements because it inappropriately recorded revenue and taxes at the SW Price and the Ruling was improperly procured. *See Galena*, 117 F. Supp. 3d at 1181 (By "disclos[ing] a lengthy list of reasons why its stock price might fluctuate, [Galena] needed to include in that list the alleged scheme that [it] was manipulating the stock prices with [promoters' help].").

Having realized the legal implications of the statements they made in the NOIA, Defendants now attempt to backtrack, claiming that Plaintiffs have not alleged facts showing that Defendants "had reason to view that suspension as indicative of a threat to the Ruling" in July 2015, especially because the suspension was lifted in August 2015. MTD at 23. Defendants' position makes no sense. By its own admission, the SAT's campaign to threaten Primero's tax arrangements led to the license suspension. ¶245. *See Rihn v. Acadia Pharms., Inc.*, 2016 U.S. Dist. LEXIS 128291, at *17 (S.D. Cal. Sept. 19, 2016) (corporate officer's post-class period admission relevant to falsity analysis). A threat is "words or conduct intended to intimidate." Ballentine's Law Dictionary (3d ed. 2010). For Defendants to have described the license suspension as part of these threats, they must have interpreted the suspension as part of the SAT's efforts to intimidate them at that time.

D. Defendants' Statements Are Not Protected by the Safe Harbor

"The safe harbor applies to forward-looking statements only, and not to material ***omissions*** or misstatements ***of historical fact***." *In re Celera Corp. Sec. Litig.*, No. 5:10-cv-02604 EJD, 2013 U.S. Dist. LEXIS 125621, at *5-6 (N.D. Cal. Sept. 3, 2013).

Defendants argue that the following statements are forward-looking and protected by the PSLRA's safe harbor:

- "Assuming" there are no changes to the External SPA or "the application of the Mexican tax laws relative to the APA [R]uling," Primero "expects to pay taxes" at the SW Price for the "life" of San Dimas.[31] ¶¶123, 134, 136, 138, 144, 148, 153, 155, 159, 163, 170, 175, 178.

[31] Defendants cite *In re Impac Mortg. Holdings, Inc.*, 554 F. Supp. 2d 1083 (C.D. Cal 2008) in support of their assertion that their statements starting with "assuming" and "expects" are "mere puffing" and therefore nonactionable. MTD at 13. In *Impac*, the court found that the use of words such as "solid" to describe "Impac's fundamentals, loan acquisitions and

- Primero "has taken the position" that if there are no changes to the "Mexican tax laws relative to the APA [R]uling" and Primero does not change the External SPA's structure, the Company will be able to pay taxes in Mexico at the SW Price for the "life" of San Dimas. ¶¶180, 185, 191, 197, 207.
- "In 2015 silver is expected to continue to be sold under the [External SPA] on the same terms and there are no known changes in the application of Mexican tax laws relative to the Ruling, so [Primero] expects to record revenues and pay taxes based on realized prices for the life of the San Dimas mine." ¶196.[32]

These statements were materially misleading because Defendants omitted that the amended transfer price did not comply with Mexican transfer pricing rules, the APA was procured improperly and therefore vulnerable to retroactive invalidation, and was highly unlikely to be renewed. *See* §§III.A, C, *supra*. In or after May 2015, these statements were misleading for the additional reason that Defendants omitted to disclose that the SAT was threatening Primero's tax arrangements and conducting audits of PEM. *See* §III.C, *supra*. Therefore, Defendants' failure to inform investors of the issues facing the continued viability of the Ruling and its renewal was not forward-looking, but an omission of fact. *See Celera*, 2013 U.S. Dist. LEXIS 125621, at *5 (while statements about the company's reimbursement practices were "technically correct" they were nonetheless misleading as "the failure to alert investors to the reimbursement problem was not forward-looking" but "an omission of a historical fact"); *City of Providence v. Aeropostale, Inc.*, 2013 U.S. Dist. LEXIS 44948, at *31-32 (S.D.N.Y. Mar. 25, 2013) ("[T]he safe harbor does not apply to material omissions[,] . . . regardless of whether the statements thereby rendered misleading were forward-looking.").

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originations were too vague to be actionable without allegations showing what was meant by that term." *Id.* at 1097. By contrast, Defendants' assumptions about the APA Ruling's continued viability and renewal "relay[] information that is tied to ***verifiable*** facts" regarding the obstacles that the APA Ruling faced and are therefore not puffery. *In re InfoSonics Corp. Sec. Litig.*, 2007 U.S. Dist. LEXIS 57784, at *18 (S.D. Cal. Aug. 7, 2007); §III.A, *supra*.

[32] Defendants do not set forth explicitly which statements besides those beginning with the words "assuming" are forward-looking. Instead, they state that other statements that are "repetitions or non-substantive variations" of the "assuming" statements are also forward-looking, and cite a number of paragraphs in which those statements appear. MTD at 13. Plaintiffs have endeavored to set forth the statements they believe Defendants are referring to. If in reply Defendants improperly challenge other statements as forward-looking, their arguments fail for reasons similar to those set forth in this section.

Additionally, the PSLRA's safe-harbor provision does not shield descriptions of past or present events. *See No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936-37 (9th Cir. 2003). "[A] mixed present/future statement is not entitled to the safe harbor with respect to the part of the statement that refers to the present." *See Mulligan v. Impax Labs, Inc.*, 36 F. Supp. 3d 942, 965 (N.D. Cal. 2014). Defendants' statements that Primero "has taken the position" that "if the Mexican tax laws relative to the APA [R]uling do not change" and the External SPA's structure does not change, Primero's "ability" to continue paying taxes based on the SW Price will continue for the life of the mine[33] were misleading because Defendants failed to disclose the true obstacles that Primero faced in continuing to pay taxes at the SW Price for the mine's life. *See* §§ III.A, C, *supra*. These statements were not forward-looking, but instead concern present facts or were mixed statements of present fact and future prediction that are not entitled to the safe harbor. *See Yanek*, 388 F. Supp. 2d at 1131 (statements suggesting that specific problems would not delay FDA approval were not forward-looking because they "convey a sense of the current state" of the company's submission to the FDA and are not "plans or objectives relating to the [company's] products or services").

E. Defendants Failed To Correct Their Statements

In any event, Defendants had a duty to correct their prior statements once their "tax arrangements" began being threatened by the SAT, which began no later than May 2015. *See* §III.C, *supra*. A duty to correct a prior statement arises "when a company makes a statement that it believes is true but later discovers . . . was untrue or misleading when . . . made." *In re Yahoo! Inc. Sec. Litig.*, 2012 U.S. Dist. LEXIS 113036, at *40 (N.D. Cal. Aug. 10, 2012).

As the SAT's tax audits, threats, license suspension, and filing of the *juicio* confirmed that the Ruling was at risk of being retroactively nullified and was highly unlikely to be renewed no later than May 2015 (*see* §III.C., *supra*), Defendants were

[33] ¶¶180, 185, 191, 197, 207.

obligated to correct their prior statements. ¶¶29-30, 226, 314. *See In re LDK Solar Sec. Litig.*, 2008 U.S. Dist. LEXIS 80717, at *30 (N.D. Cal. Sept. 24, 2008) ("[I]f defendants made false statements unknowingly but learned of the falsity of their statements thereafter, they had a duty to disclose the information necessary to correct the misstatements, and the failure to do so can give rise to Section 10(b) liability."); *Ponce v. SEC*, 345 F.3d 722, 735 (9th Cir. 2003) (Under SEC Rule 12b-20, 17 C.F.R. §240.12b-20, Defendants had a duty "to correct any misstatements or omissions in documents filed with the SEC.").

Defendants seem to argue, without citation to any authority, that Mast could not have corrected any of the false or misleading statements alleged herein because he did not join Primero until February 2015. MTD at 40. As alleged in the AC, Mast served as Chief Operating Officer prior to becoming CEO on January 31, 2016. ¶¶24, 313. By virtue of his role as a corporate officer, he had the ability to cause previously issued statements to be corrected. ¶345; *see also* ¶¶29-30, 226; *In re Bayer AG Sec. Litig.*, 2004 U.S. Dist. LEXIS 19593, at *29-30 (S.D.N.Y. Sept. 30, 2004) (finding defendants, including officers who had not made statements before August 2000, had a duty to update statements previously made about the drug's safety profile once they were aware of information in August 2000 that rendered prior statements misleading). At the very least, Mast had a duty to correct Conway's statements at the November 3, 2015 conference call he attended. ¶224. "[An officer] may not cloak himself in his silence and avoid liability for the misleading statements of his co-defendants made to public stock analysts during a conference call at which he was present." *Plumbers Union Local No. 12 Pension Fund v. Ambassador's Group*, 717 F. Supp. 2d 1170, 1180 (E.D. Wash. 2010). Mast failed to do so. ¶314.

F. Defendants Acted With The Requisite Scienter

Defendants acted with scienter if they "acted with the intent to deceive or with deliberate recklessness as to the possibility of misleading investors." *Berson*, 527 F.3d at 987. The Court is to undertake a dual inquiry, first "determin[ing] whether any of the plaintiff's allegations, standing alone, are sufficient to create a strong inference of scienter," and "second, if no individual allegations are sufficient, [conducting] a holistic review of the same allegations to determine whether the insufficient allegations combine to create a strong inference of intentional conduct or deliberate recklessness." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 992 (9th Cir. 2009). The inference must be "cogent" and "***at least as likely as*** any plausible opposing inference." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328 (2007) (original emphasis). But it need not be irrefutable or of the "smoking-gun" variety, *id.* at 324: "vague or ambiguous allegations" are "properly considered" to determine "whether the complaint raises a strong inference of scienter," *S. Ferry LP v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008). Circumstantial evidence also suffices. *See Reese*, 747 F.3d at 574.

1. Christian Natera's Scienter Is Imputed To Primero

"[T]he Ninth Circuit [] recognizes respondeat superior liability for a corporation under 10(b) and 10b-5 based on common law agency principles." *In re Hienergy Techs., Inc.*, 2005 U.S. Dist. LEXIS 47044, at *23 (C.D. Cal. Oct. 24, 2005). Thus, "[t]he scienter of the" agents "of a corporation may be attributed to the corporation itself to establish liability as a primary violator of § 10(b) and Rule 10b-5" when those agents were acting within the scope of their actual or apparent authority. *See In re ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471, 476 (9th Cir. 2015). This is true for attorney agents as well. *See Santangelo v. Bridgestone/Firestone, Inc.*, 499 F. App'x 727, 729 (9th Cir. 2012) ("Knowledge of these facts by Santangelo's attorneys is imputed to Santangelo because they were acting as her agent."); *see also In re Lombard Flats, LLC*, 2014 U.S. Dist. LEXIS 113127, at *65 (N.D. Cal. Aug. 13, 2014) (same). Here, Christian's knowledge about the preparation and improper approval of the APA is imputed to Primero because he was its attorney-agent includes his knowledge that: (1) based on his time at the SAT and his transfer pricing expertise, the Amended Internal SPA obviously did not comply with Mexico's transfer pricing rules, ¶¶92, 309; (2) his brother Luis was the head of the Transfer Pricing Audit

Administration at the SAT and the person responsible for improperly approving Primero's APA, ¶¶94, 309; and (3) based on his time at the SAT, the Federal Law on Administrative Responsibilities of Public Servants required Luis's recusal from working on Primero's APA, ¶310. Christian is presumed to have disclosed the foregoing facts to Primero, "[b]ecause an agent has a duty to inform his principal of all material facts, the law presumes that the agent has in fact done so." *Nathanson v. Polycom, Inc.*, 87 F. Supp. 3d 966, 981 (N.D. Cal. Apr. 3, 2015) (*Nathanson II*).

2. Defendants Had Access To or Recklessly Disregarded Contradictory Information

Plaintiffs may plead scienter by showing that the defendants had actual knowledge of or ***likely had access to*** facts that contradict their contemporaneous statements or otherwise render them misleading. *See In re Amgen Inc. Sec. Litig.*, 2014 U.S. Dist. LEXIS 183034, at *32 (C.D. Cal. Aug. 4, 2014). "The most direct way to show both that a statement was false when made and that the party making the statement knew that it was false is via contemporaneous reports or data, available to the party, which contradict the statement." *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1230 (9th Cir. 2004); *Reese*, 747 F.3d at 574. In pleading access to contradictory information, the plaintiff need not allege that the defendant "actually received" the information; instead, proof of "close topical and temporal proximity" of the information to the defendant is sufficient. *Amgen*, 2014 U.S. Dist. LEXIS 183034, at *31, 34.[34]

Plaintiffs may also plead scienter by alleging that Defendants were deliberately reckless to the fact that their statements may mislead investors. *See Berson*, 527 F.3d at 987. Deliberate recklessness means that the reckless conduct "reflects some degree of intentional or conscious misconduct." *S. Ferry LP*, 542 F.3d at 782. "An actor is deliberately reckless if he had reasonable grounds to believe material facts existed that were misstated or omitted, but nonetheless ***failed to obtain and disclose*** such facts

[34] *See also Robb v. Fitbit, Inc.*, 2016 U.S. Dist. LEXIS 149321, at *30-31 (N.D. Cal. Oct. 26, 2016) (imputing the scienter of non-defendant, non-speaker COO to the Company).

although he could have done so without extraordinary effort." *Reese*, 747 F.3d at 569; *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1098 (9th Cir. 2011) ("[A]llegations of recklessness have been sufficient where defendants failed to review or check information that they had a duty to monitor, or ***ignored obvious signs of fraud***.").[35]

a. Events Surrounding Approval of the APA Put Defendants on Notice that It Was Procured by Fraud

Plaintiffs adequately plead that Defendants had access to sufficient information to put them on notice that the APA was illegally procured by the Natera brothers.

First, Defendants were on notice that Mexican transfer pricing rules would have classified the amendment of the Internal SPA as a transaction between related parties. ¶¶82-91. Indeed, the facts indicating that the amendment was not at arm's-length were general corporate knowledge. Primero's SEC filings, signed by Conway, Blaiklock, and Kaufman, readily admitted that PEM and ST Barbados were Primero's wholly-owned subsidiaries, ¶83, no additional consideration was exchanged in the transaction, ¶86, and PEM sells silver to independent parties at the Spot Price, ¶¶74, 212. *See Howard v. Everex Sys.*, 228 F.3d 1057, 1061 (9th Cir. 2000) ("When a corporate officer signs a document on behalf of the corporation, that signature will be rendered meaningless unless the officer believes that the statements in the document are true."); *In re Adaptive Broadband Sec. Litig.*, 2002 U.S. Dist. LEXIS 5887, at *56 (N.D. Cal. Apr. 2, 2002) (same). Conway himself stated that he and other officers had been looking at "transfer pricing scenarios under OECD law regulations," ¶80, and the SEC filings signed by Blaiklock and Kaufman repeatedly stated that "there are no changes in Mexican tax law[,]" indicating that Conway, Blaiklock, and Kaufman had reviewed the applicable provisions regarding transfer pricing which would have put them on notice of the accounting treatment for related-party transactions. "It is unclear what

[35] *cf. Helwig v. Vencor*, 251 F.3d 540, 558 (6th Cir. 2001) ("A defendant who asserts a fact as of his own knowledge . . . when he knows that he does not in fact know whether what he says is true, is found to have intent to deceive, not so much as to the fact itself, but rather as to the extent of his information.").

further facts [P]laintiffs would need to plead to create a stronger inference that [Defendants] had access to information [they] discussed publicly." *Reese*, 747 F.3d at 572, 574 (finding the inference that the defendant did not have access to undisclosed data "is directly contradicted by the fact that she specifically addressed it in her statement"); *Roberti v. OSI Sys.*, 2015 U.S. Dist. LEXIS 24761, at *30 (C.D. Cal. Feb. 27, 2015) ("[A]n inference of scienter can be established by the fact that the Defendants touched on the specific issue of ATR testing and readiness in their public statements.").

As CEO and CFO of a company with 26 employees, ¶256, who were tasked with managing Primero's "tax strategies," ¶¶270, 271, and whose compensation was tied to obtaining the APA Ruling, *id.*, it would have been nearly impossible for Conway and Blaiklock not to have known which law firm Primero retained to seek the Ruling and why it was selected. *See Reese*, 747 F.3d at 572 (finding scienter when defendant "was directly responsible for the WOA and EOA operations" and not only would have been "aware of corrosion problems, but [] would be among the first to know"). Under similar circumstances, in *Brown v. China Integrated Energy, Inc.*, when an officer undertook the role as the "financial expert and chair of the audit committee" it could be presumed that he "would have known facts that were of dramatic importance to the company and that the statements in the SEC filings concerning revenue and income were false." 2013 U.S. Dist. LEXIS 90279, at *38 (C.D. Cal. Apr. 22, 2013). Furthermore, Defendants spoke about the APA application at length: it dominated nearly every 6-K signed by Blaiklock, and Conway specifically spoke about the APA on numerous occasions. ¶¶90, 105, 106, 110, 125. Thus, Defendants "bridge[d] the [scienter] gap [themselves] by referencing the" APA, indicating they knew, or were reckless in not knowing, the very basic fact of which law firm was retained to seek the tax ruling and why. *Reese*, 747 F.3d at 572; *Loritz v. Exide Techs.*, 2014 U.S. Dist. LEXIS 111491, at *34 (C.D. Cal. Aug. 7, 2014) (when defendant "spoke to investors about environmental modifications at" a Vernon plant, it followed that "management was aware of, and involved in environmental compliance issues at Vernon”).

Moreover, the circumstances of the Ruling are sufficiently suspicious to indicate that Defendants knew Christian’s fraternal relationship with Luis was the only reason the APA was approved. For example, according to Defendants, Primero had already retained four international consulting firms to advise on its tax structure, MTD at 6, ¶80, two of which Plaintiffs cite as sources on IFRS and APAs in Mexico, ¶¶44, 51, 54. Thus, with these experts already on retainer, it makes no sense why Primero also needed Christian to assist with the APA application. The only plausible inference is that Defendants were aware of Christian’s history of using his connections at the SAT to secure large tax refunds for corporations—and wanted his help to do the same. ¶93. Furthermore, the odds that, out of approximately 120 million residents of Mexico, Defendants coincidentally hired the brother of the public figure who ultimately authorized the APA are approximately 120 million to 1. ¶307. The fact that Luis did not sign the APA, even though the SAT stated he supervised the ruling, is also highly suspicious. ¶311. *See Silver Wheaton*, 2016 U.S. Dist. LEXIS 74162, at *40 n.8 (missing files during audit was sufficiently suspicious to support scienter); *Burnett v. Rowzee*, 561 F. Supp. 2d 1120, 1130 (C.D. Cal. 2008) (suspicious fund transfers by defendant supported inference that he acted with scienter).

b. Press Coverage Put Defendants on Notice that Mexico May Challenge the Ruling

Defendants were aware as early as November 2012 that transfer pricing was under “intensified scrutiny,” ¶260, which grew in December of that year when Pena Nieto’s government took power, ¶261. Under the purview of Oscar Molina Chie, the SAT began a widespread reassessment of the tax obligations of multinational corporations, including those in the mining industry. ¶261. Chie noted, “[i]t matters a lot to us that these companies change their structure to structures where the taxes they pay in Mexico are exactly right.” ¶261. This highly publicized crackdown on Primero’s industry put Defendants on notice that the APA would likely be in the SAT’s cross-hairs. ¶262; *see Westley v. Oclaro, Inc.*, 2013 U.S. Dist. LEXIS 76258, at *15 (N.D. Cal. May 30, 2013) (finding that what was "known to those experienced in the industry" lends to the inference of scienter). Under similar circumstances, in *Silver Wheaton*, 2016 U.S. Dist. LEXIS 74162, at *34, the court found that the defendants were presumed to have been aware of "information in Canadian business sectors that the" tax authority was prioritizing audits of "companies with large foreign income in low-tax jurisdictions, particularly in the natural resources industry."

c. Defendants Were on Notice of the SAT's Harassment

Primero was clearly on notice that renewal was in jeopardy, as it admitted in its NOIA that beginning in at least May 2015, the SAT "initiated tax audits for certain fiscal years covered by the APA" and "[o]ther investigations and inspections" and expressed "complaints about PEM's tax arrangements" "during meetings" with PEM which was all designed to force Primero to enter into a tax settlement. ¶291. In regard to the Individual Defendants, Conway explained that he was involved in the SAT communications, stating, "we are having some discussions with the tax authorities" regarding the APA. ¶224; *In re Amgen Inc. Sec. Litig.*, 2014 U.S. Dist. LEXIS 183034, at *34-35 (C.D. Cal. Aug. 4, 2014) (while allegations did not specify what was discussed at the meeting, defendants' attendance alone supported access to likely topics of discussion); *Galena*, 117 F. Supp. 3d at 1172 (finding scienter when allegations that public relations discussions occurred at board meetings raised the "plausible inference that" the stock promoters "were included in the discussion"). Kaufman signed each of the 6-Ks filed after November 2014 which discussed the Mexican tax authorities' view of the tax revenue recorded from the Internal SPA and explained that there had been no changes in the "application of Mexican tax laws relative to the Ruling." *See, e.g.*, ¶205. Thus, by discussing the Mexican tax authorities' views on the APA and the current application of the law thereto, Kaufman indicated that she either knew of the SAT's "threats" and complaints, or was reckless in not knowing them. *See Silver Wheaton*, 2016 U.S. Dist. LEXIS 74162, at *36 (under analogous circumstances, finding it "highly unlikely" that the executives present at the audit "would not have informed their superiors at Silver Wheaton of the CRA's" assessments during audit). Therefore, it is implausible that information concerning SAT's threats was not available to Defendants.

Defendants beg the Court to ignore their admissions in the NOIA regarding the license suspension. That is not how 12(b)(6) motions work. Further, "the simple fact that [Primero] had an explanation for its view of the [suspension] does not mean that investors would not want to know that [Primero] and the [SAT] were at odds." *Arena*, 2016 U.S. App. LEXIS 19318, at *26. Defendants' argument that no scienter exists as to the filing of the *juicio* in August 2015 because Primero disclosed service in February 2016 is nonsensical. Scienter is established when Defendants had access to or were reckless to the existence of information that contradicted their public statements. This inference is not negated because a defendant ***eventually*** chose to disclose that information. Glaringly absent from Defendants' argument is any allegation that they were ***not aware*** that the *juicio* was filed prior to February 2016. This is no surprise, as the SAT's notifying Primero of the filing of the *juicio* follows Primero's own narrative, ¶291: the SAT sought nullification of the APA to further its program of harassment to pressure to Primero to enter into a tax settlement. Indeed, it makes no sense why the SAT would threaten to "make an example" out of Primero, ¶¶291, 295, but not inform Primero when it in fact took action to do so. The Court "certainly need not close [its] eyes to circumstances that are probative of scienter viewed with a practical and common-sense perspective." *S. Ferry LP*, 542 F.3d at 784.

3. Defendants Had Knowledge of Primero's Core Operations

Plaintiffs' "[a]llegations regarding management's role in [the] corporate structure" satisfy scienter under the following prongs of the core operations theory: (1) the allegations may be viewed as part of the holistic analysis; (2) they are alone sufficient "where they are particular and suggest that defendants had actual access to" the information (§III.F.2, *supra*); and (3) they are alone sufficient because "the relevant fact[s] [are] of such prominence that it would be 'absurd' to suggest that management" was unaware of them. *Reese*, 747 F.3d at 575-76. Primero not only spoke about the APA at length, ¶255, it described the San Dimas mine as its "flagship property," ¶253, and emphasized that "[t]axes remain a key focus," ¶254. *See Curry v. Hansen Medical, Inc.*, 2012 U.S. Dist. LEXIS 112449, at *32 (N.D. Cal. Aug. 10, 2012) (because defendant had less than 200 employees and sold so few units, each of which was significant to its revenue stream, the individual defendants must have known about each of the sales). Primero "is not to be confused with Apple. The [I]ndividual [D]efendants [ ] are not officers in a large company who may be removed from the details of a specific business line or remote business activity." *Patel v. Axesstel, Inc.*, 2015 U.S. Dist. LEXIS 18385, at *29 (S.D. Cal. Feb. 13, 2015) (with 35 employees, "the individual defendants would be among the first (and only) to know of the details of major contracts[.]"). Primero had between 26 and 68 employees, ¶256, and the Individual Defendants were all high ranking officers, thus, it would be absurd to think that they did not know of the details of, and the pending threats to, the tax structure for their largest asset. *See Acadia*, 2016 U.S. Dist. LEXIS 128291, at *26-27 (it is absurd to suggest that CEO and CFO of a 97 person company did not know that an integral inspection of facilities had not occurred).

Furthermore, the importance of the Ruling to Primero suggests that Defendants were aware of the issues surrounding the Ruling, the violation of the accounting rules, and the risks facing its renewal. The amount of the contingent liability relating to the pending APA in 2011 was 49% of Primero's gross income for that year, and in 2012 was nearly 100% of Primero's gross income. ¶257. The Ruling doubled Primero's net present value. ¶258. In a recent case, the court found that while "Plaintiffs allege no particular facts indicating that [individuals] actually knew about the [regulatory issues faced by Silimed]" scienter may be established by "infer[ring] that these high-level managers must have known about the [regulatory issues] because of their devastating effect on the corporation's revenue." *Flynn*, 2016 U.S. Dist. LEXIS 83409, at *41;

Berson, 527 F.3d at 988 n.5 ("The size of the contract and the prominence of the client raise a strong inference that defendants would be aware of this order."). Thus, it would be absurd to suggest that Defendants were unaware of the true facts regarding the APA Ruling.[36]

4. Defendants' Financial Motives Support Scienter

a. Cash Incentive Awards Support Scienter

"A motive to defraud based on compensation incentives such as bonuses and dividends also may strengthen an inference of scienter." *In re New Century*, 588 F. Supp. 2d 1206, 1232 (C.D. Cal. 2008). Defendants' own case law explains that "[a] strong correlation between financial results and stock options or cash bonuses for individual defendants may" support a finding of scienter. *Zucco*, 552 F.3d at 1004.[37] Here, even more specific than general "financial results," Conway's and Blaiklock's cash incentive awards were tied to "[Primero]'s tax strategies" and "obtaining the Ruling[.]" ¶¶270-71. Thus, they were personally motivated to obtain the Ruling by any means necessary. *See Am. W.*, 320 F.3d at 944 (bonuses supported inference of scienter when no incentive awards were paid the year prior).

b. Suspicious Stock Sales

"Suspicious" class period stock sales by corporate insiders can demonstrate scienter. *See Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1232 (9th Cir. 2004). As shown below, the following factors contribute to a strong inference of scienter: (1) the amount and percentage of shares sold; (2) timing of the sales; and (3) consistency with prior trading history." *Id.*

Amount: During the Class Period, Conway sold 1,572,357 Phantom Share Units

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[36] Contrary to Defendants' assertion, the fact that Defendants disclosed that Mexican tax laws may change does not negate the inference of scienter when Defendants were aware that they were in violation of ***current*** Mexican tax laws. *See In re Countrywide Fin. Corp. Mortg.-Backed Secs. Litig.*, 932 F. Supp. 2d 1095, 1116 (C.D. Cal. 2013) ("[broad] risk disclosures . . . do not, as a matter of law, undermine the inference that [Defendant] acted with scienter").

[37] *Kushner v. Beverly Enterprises*, 317 F.3d 820, 830 (8th Cir. 2003), which is out of circuit, is not compelling as the bonus awards there were simply tied to financial performance.

("PSU") for proceeds of $8,412,050.87, ¶279; Blaiklock sold 206,930 PSUs for proceeds of $1,322,271.40, ¶281; and Chairman of the Board Wade Nesmith ("Nesmith") sold 1,341,025 PSUs for proceeds of $7,599,404.35, ¶283.[38] These sales were 4, 2, and 10 times their base salaries, respectively. ¶¶280, 282, 284. The amount and percentage of these sales is very suspicious. *See Provenz v. Miller*, 102 F.3d 1478, 1491 (9th Cir. 1996) (insider's sales of $1.34 million suspicious); *Fecht v. Price, Co.*, 70 F.3d 1078, 1084 (9th Cir. 1995) (sales of $1.6 million by two insiders suspicious).

Timing: The timing of the insiders' PSU sales also demonstrates their knowledge that the Ruling was fraudulently procured and would likely not be renewed. The vast majority of the sales took place in 2013 and 2014, prior to the expiration of the Ruling. ¶¶279, 281, 283. Even those that took place in 2015 were prior to the deadline for renewal. *See id.*; *Am. W.*, 320 F.3d at 939 (finding timing of sales suspicious when insiders sold in rapid succession during time they were making false statements). Many sales were made on the same day (March 14-15, 2013; August 30, 2013; May 20, 2014; April 20, 2015), and at peak prices (sales in 2013 at $6.11 when peak price in 2013 was $6.73; sales at $7.90 in 2014 when peak price in 2014 was $8.29; sales at $4.16 in 2015 when peak price in 2015 was $4.85). ¶¶279, 281, 283, 348; *see In re Skechers U.S.A., Inc., Sec. Litig.*, 273 F. App'x 626, 630 (9th Cir. 2008) (timing added to the inference of scienter "because the sales took place during the period when Skechers' stock price hit its peak."); *In re Secure Computing Corp.*, 184 F. Supp. 2d 980, 990 (N.D. Cal. 2001) (finding timing of sales suspicious where insiders often sold on the same days).

Inconsistency: The AC demonstrates that the insiders' sales were dramatically inconsistent with their prior selling histories. Conway, Blaiklock, and Nesmith only sold on one occasion prior to the Class Period and their pre-Class Period sales were only 2%, 6.4%, and 1.2% of their Class Period sales, respectively. ¶¶279, 281, 283;

[38] Defendants' argument that insiders may not have had discretion over PSU sales ignores the well-plead allegations in the complaint. Plaintiffs specifically state that grantees exercise their own PSUs. ¶274.

see Brodsky v. Yahoo! Inc., 630 F. Supp. 2d 1104, 1119 (N.D. Cal. 2009) (finding pre-class period sales suspicious when they "constituted only seven percent [], nine percent [], eight percent [] and thirty-nine percent [] of their Class Period sales").[39]

c. Acquisition of Additional Mines

"Courts have recognized the powerful motive to distort a company's stock price when the stock will be used to acquire another company." *In re Terayon Communs. Sys.*, 2002 U.S. Dist. LEXIS 5502, at *35 (N.D. Cal. Mar. 29, 2002). Here, within two months of the Ruling, Defendants announced their intention to purchase the Cerro Del Gallo project, ¶289. Two years later, Primero also acquired Brigus Gold Corp. ¶288. The Ruling removed Primero's crippling tax burden of 255% (MTD at 5) and infused Primero with a $22.2 million refund and positive cash flows, ¶107. These stock–based acquisitions would not have been possible but for Defendants' fraud, ¶285, and add to the inference of scienter. *See Rothman v. Gregor*, 220 F.3d 81, 93 (2d Cir. 2000) ("not every company has the desire to use its stock to acquire another company"); *In re Boeing Sec. Litig.*, 40 F. Supp. 2d 1160, 1175 (W.D. Wash. 1998) ("[D]efendants concealed Boeing's production problems so that the price of Boeing stock would remain high enough to make the merger attractive[.]").

5. Defendants' Tax and Ethics Violations Support Scienter

"Violations of [accounting] standards can also provide evidence of scienter." *Daou*, 411 F.3d at 1016. "After all, books do not cook themselves." *McKesson*, 126 F. Supp. 2d at 1273. When alleging accounting violations, plaintiffs need not identify the particulars of each transaction, they must only plead "enough information so that a court can discern whether the alleged [] violations were minor or technical in nature, or whether they constituted widespread and significant inflation of revenue." *See Daou*, 411 F.3d at 1016. There is no question that Plaintiffs plead in detail Defendants' fraudulent scheme to underpay taxes owed to the Mexican government and misreport

[39] *Turocy v. El Pollo Local Holdings, Inc.*, 2016 U.S. Dist. LEXIS 101772, at *35 (C.D. Cal. July 25, 2016) is inapposite because there the plaintiff did not allege any context around the sales, or that the sales were inconsistent with prior trading history.

Primero's tax obligations in violation of IFRS, which resulted in a gross understatement of Primero's tax liabilities. ¶¶298-301. In fact, this pervasive scheme to shirk Primero's tax obligations had significant implications: it resulted in the failure to report a liability that was nearly equal to income in 2012. ¶98; *see Stocke v. Shuffle Master, Inc.*, 615 F. Supp. 2d 1180, 1190 (D. Nev. 2009) ("[T]he amount by which . . . full year and fourth quarter 2006 net income increased due to the accounting errors by 33.6% and 53.6%, respectively, lend to an overall inference of scienter.").[40]

As well, Defendants' violations of Primero's Ethics Code, specifically the provisions prohibiting using agents or non-employees to violate the law, ¶¶316-317, supports an inference of scienter. *See Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996); *SEC v. Todd*, 642 F.3d 1207, 1217 (9th Cir. 2011) (upholding finding of liability where the company's "internal policies, which had been disclosed to investors, were violated"); *see also Nathanson II*, 87 F. Supp. 3d at 979 (concealment of activity expressly prohibited by company policies contributed to inference of scienter).

6. Defendants' Inherently Fraudulent Activity Supports Scienter

Certain schemes are inherently fraudulent by their nature and therefore "sufficient in [themselves] to establish a finding of knowledge." *Levine v. Metal Recovery Techs.*, 182 F.R.D. 108, 111 (D. Del. 1998); *SEC v. Tropikgadget FZE*, No. 15-cv-10543-ADB, 2016 U.S. Dist. LEXIS 117444, at *21-22 (D. Mass. Aug. 31, 2016) (nature of pyramid scheme adequately supported requisite inference of scienter); *cf. In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 27 F. Supp. 3d 447, 470-71 (S.D.N.Y. 2014) (fact that "there is no conceivably legitimate purpose for submitting

[40] The fact that Primero's auditors did not counsel against Primero's accounting violations does not negate an inference of scienter. Numerous courts have found that a "clean" audit opinion does not exonerate defendants because "absent discovery, there is no way to know what communications transpired between [the auditor] and [the company][,]" making it impossible to determine whether the company hid the fraud from the auditors. *Okla. Firefighters Pension & Ret. Sys. v. Ixia*, 50 F. Supp. 3d 1328, 1365 n.184 (C.D. Cal. 2014); *In re LDK Solar Sec. Litig.*, 584 F. Supp. 2d 1230, 1246 (N.D. Cal. 2008). *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1068-69 (9th Cir. 2008) does not compel a different result because the accounting practices alleged there were not improper on their face.

inaccurate LIBOR quotes" contributed to an inference of scienter). Primero's decision to hire Christian Natera to ensure that the Ruling was improperly approved so that Primero could evade taxes, was inherently fraudulent. ¶¶306-10.

7. Conway's Resignation Supports Scienter

Conway's sudden resignation announcement a few short months after the SAT began investigations and audits of PEM and filed the *juicio* suggests that he was involved in the alleged activity cited in the *juicio*. ¶313; *See In re UTStarcom, Inc. Sec. Litig.*, 617 F. Supp. 2d 964, 976 (N.D. Cal. 2009) (resignations after SEC staff recommended SEC file injunction against defendant supported inference of scienter); *Willis v. Big Lots, Inc.*, 2016 U.S. Dist. LEXIS 8028, at *98 (S.D. Ohio Jan. 21, 2016) (resignation after commencement of DOJ investigation was suspicious).[41]

8. Defendants' SOX Certifications Support Scienter

In the Ninth Circuit, certifications pursuant to the Sarbanes-Oxley Act of 2002 ("SOX") are "probative of scienter if the person signing the certification was severely reckless in certifying the accuracy of the financial statements." *Glazer Capital Mgmt. v. Magistri*, 549 F.3d 736, 747 (9th Cir. 2008). Here, that Conway, Blaiklock, and Kaufman "certified that [Primero's] reports to the SEC did not omit any material facts necessary in order to make the reports not misleading," ¶¶319-322, when they "had reason to believe that the [SAT] would reassess [Primero's] tax liability to a significant degree" is probative of scienter. *Silver Wheaton*, 2016 U.S. Dist. LEXIS 74162, at *43 n.9.

G. Defendants' Fraud Caused Plaintiffs' Losses

Plaintiffs properly plead loss causation under both a corrective disclosure theory and a materialization of the risk theory. *See Mauss v. NuVasive, Inc.*, 2015 U.S. Dist. LEXIS 178117, at *46 (S.D. Cal. Aug. 28, 2015).

"A corrective disclosure reveals the fraud, or at least some aspect of the fraud, to

[41] In *Zucco*, 552 F.3d at 1002, the resignation of the CFO was not accompanied by any additional circumstances that may have made it suspicious.

the market." *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1266-67 (S.D. Cal. 2010). On February 3, 2016, Primero issued a press release announcing that it had received service of the SAT's legal claim seeking to nullify the APA, ¶227, causing Primero's stock price to drop more than 28%, ¶342. The fact that the SAT was seeking to ***nullify*** the Ruling, as opposed to merely refusing to renew it, signaled to the market that the SAT believed the Ruling was improperly procured, the SAT determined that the accounting pursuant to the Ruling was incorrect, and Primero would likely not be paying taxes on realized prices for the life of the San Dimas mine. Thus, this disclosure corrected *inter alia* Primero's previous statements that (1) the Ruling "confirmed that [PEM] appropriately records revenue and taxes from sales under the [Amended Internal SPA] at realized prices"; (2) assuming there are "no changes to the application of Mexican tax laws relative to the Ruling," Primero expects to "pay taxes based on the realized prices for the life of the San Dimas mine"; and (3) Primero's FS "are prepared in accordance with International Financial Reporting Standards[.]" It also indicated that Primero's tax liabilities have been understated and its net income overstated since the issuance of the APA Ruling.

"Because loss causation is simply a variant of proximate cause, the ultimate issue is whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss." *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016). Thus, a corrective disclosure must have some connection to a misrepresentation, but it "need not reflect every detail of the alleged fraud," *Teamsters Local 617 Pension & Funds v. Apollo Group, Inc.*, 633 F. Supp. 2d 763, 820 (D. Ariz. 2009) and it "need not precisely mirror the misstatement or admit fraud." *Nathanson II*, 87 F. Supp. 3d at 985. Loss causation can also be plead "by alleging that the content of the omissions caused [plaintiff's] losses." *WPP Lux. Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1053 (9th Cir. 2009).[42] Here, the *juicio* is directly related

[42] For example, in *In re Montage Tech. Group Ltd. Sec. Litig.*, 78 F. Supp. 3d 1215, 1227 (N.D. Cal. 2015), the court found that loss causation was properly alleged although the analyst report did not identify fraudulent aspects of SEC filings because "absolute certainty is not

to the misrepresentations about the APA and Primero's tax liabilities thereunder. Subsequently published *Reforma* articles revealed the Natera brothers' involvement in the Ruling, ¶¶230-31, 235, and the later issued NOIA revealed the SAT's threats to the market, ¶¶240-47. *See Lloyd*, 811 F.3d at 1211 (subsequent press release that company mischaracterized loans confirmed investors' suspicions regarding subpoena announced one month prior).

Under the materialization of the risk theory, a plaintiff establishes loss causation by alleging that "the defendant's misstatements and omissions concealed [a risk] that materialized and played some part in diminishing the market value of the security." *Cement & Concrete Workers Dist. Council Pension Fund v. Hewlett Packard Co.*, 964 F. Supp. 2d 1128, 1145 (N.D. Cal. 2013). Defendants do not address this theory, which Plaintiffs expressly pled, ¶341, and thus concede it. *See Nathanson I*, 2015 U.S. Dist. LEXIS 50450, at *3.[43]

The pleading of loss causation is not negated by the fact that Primero's stock price declined for one day prior to the corrective disclosure, continued to decline for several days after the corrective disclosure, and eventually rebounded nearly five months later. There are several reasons why these stock price movements are irrelevant. First, the causes of stock price fluctuations are issues of fact requiring analysis by a damages expert, and thus are inappropriate at the motion to dismiss stage. *See Fitbit*, 2016 U.S. Dist. LEXIS 149321, at *30-31 ("Whether the stock drop was due

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required[.]" *See also Garcia v. Guo*, 2016 U.S. Dist. LEXIS 1819, at *41 (C.D. Cal. Jan. 7, 2016) (short seller report was sufficient corrective disclosure when it suggested that the company's accounting was improper). The only case Defendants cited, *Metzler*, is distinguishable because there the corrective disclosure related to an investigation at 1 of the company's 88 colleges, so it was understandably insufficient to reveal a company-wide problem. 540 F.3d at 1064.

[43] Regardless, it is satisfied here: Defendants' misstatements and omissions concealed conditions and events, *i.e.*, the fraudulent procurement of the Ruling, Primero's related improper accounting, and the SAT's harassment, which created the risks that the Ruling may be invalidated and Primero may be required to pay back-taxes to Mexico. The risks flowing from these undisclosed facts materialized on February 3, 2016 when Primero announced the *juicio*, causing Primero's stock price to drop precipitously. *See* ¶¶341-342; *NuVasive*, 2015 U.S. Dist. LEXIS 178117, at *46-47 (undisclosed illegal activity created a "risk of regulatory scrutiny" that materialized in a government investigation and settlement).

to other factors is a factual inquiry better suited for determination on summary judgment or trial, rather than at the pleading stage."); *Rosado v. China North East Petroleum Holdings, Ltd.*, 692 F.3d 34, 41 (2d Cir. 2012) ("At this stage in the litigation, we do not know whether the price rebounds represent the market's reactions to the disclosure of the alleged fraud or whether they represent unrelated gains."). Second, pre-disclosure price declines "[are] not inconsistent with the theory that the price was artificially inflated, since the misrepresentations may well have buoyed a price that would otherwise have sunk much faster, thus raising the price at which plaintiffs purchased the stock." *Demarco v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 110, 124 (S.D.N.Y. 2004); *Nathanson II*, 87 F. Supp. 3d at 984 ("a stock price can decline during the class period . . . and still be artificially inflated"). Lastly, Primero's stock price increase months later is irrelevant. The court in *In re Cell Therapeutics, Inc. Class Action Litig.*, explained, "[f]luctuations in the price of CTI stock days, weeks or months after the initial drop could be the result of any number of factors and do not invalidate loss causation as plead by Plaintiffs[.]" 2011 U.S. Dist. LEXIS 11157, at *18 (W.D. Wash. Feb. 4, 2011); *Nathanson II*, 87 F. Supp. 3d at 984 (stock price increase two months after corrective disclosure did not negate loss causation).

IV. DEFENDANTS CONCEDE PLAINTIFFS' SECTION 20(a) CLAIMS

By failing to address Plaintiffs' control person claims, ¶¶344-46, 368-75, Defendants have waived any argument for dismissal of Count II against the Individual Defendants. *See Nathanson I*, 2015 U.S. Dist. LEXIS 50450, at *2-3.

CONCLUSION

Plaintiffs respectfully request that the MTD be denied. Alternatively, Plaintiffs request leave to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

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Respectfully submitted,

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